No. 08-1081

In the Supreme Court of the United States

GERARD CAVERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of review to petitioner's claim that his above-Guidelines sentence was unreasonable.

2. Whether petitioner's sentence was unreasonable because the district court relied in part on the greater need to deter illegal firearms trafficking in markets where unusually strict gun controls may make trafficking more profitable.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1a-96a) is reported at 550 F.3d 180. The vacated panel opinion of the court of appeals is reported at 505 F.3d 216. The opinion of the district court (Pet. App. 97a-118a) is reported at 379 F. Supp. 2d 288.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2008. The petition for a writ of certiorari was filed on February 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of conspiring to deal in and transport firearms illegally, in violation of 18 U.S.C. 922(a)(1)(A) and (5) and 18 U.S.C. 371. He

was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. Pet. App. 4a, 8a, 97a. A panel of the court of appeals vacated petitioner's sentence. 505 F.3d 216, 219 (2007). On rehearing en banc, the court of appeals affirmed the sentence. Pet. App. 33a.

1. Beginning in July 2003, a confidential informant purchased guns illegally in New York City from Peter Abbadessa. Abbadessa told the informant that his guns were supplied by petitioner, a Florida resident friendly with Abbadessa's uncle, Anthony Luciana. In April 2004, Abbadessa, Luciana, and the informant flew to Florida to purchase firearms from petitioner. Abbadessa and Luciana paid petitioner $11,500 in exchange for two boxes containing sixteen firearms. They then gave the boxes to the informant, who turned them over to the FBI. Pet. App. 4a, 102a-103a.

A grand jury sitting in the Eastern District of New York returned an indictment charging petitioner, Abbadessa, and Luciana with various federal firearms-trafficking offenses. Pet. App. 4a. Petitioner pleaded guilty to one count of conspiring to deal in and transport firearms, in violation of 18 U.S.C. 922(a)(1)(A) and (5) and 18 U.S.C. 371. Pet. App. 4a, 97a.

2. Petitioner's advisory Sentencing Guidelines range was 12-18 months of imprisonment. Pet. App. 103a-104a. At petitioner's initial sentencing hearing, the district court gave notice that it was contemplating an above-Guidelines sentence to reflect the seriousness of the crime of conspiring to transport illegal firearms into New York City. *Id.* at 4a-5a. The district court subsequently issued a sentencing memorandum and opinion, *id.* at 97a-118a, in which it decided to impose a sentence six months longer than the top of petitioner's advisory

Guidelines range. Noting the statutory direction to consider the seriousness of the offense and the need for deterrence, see 18 U.S.C. 3553(a)(2)(A) and (B), the district court concluded that in an area with strict gun-control laws, such as New York City, the incentives to engage in illegal gun-running are higher and, "[a]ccordingly, a more severe penalty is necessary to produce adequate deterrence." Pet. App. 110a-111a. The district court also opined that gun-smuggling crimes have "the potential to create a substantially greater degree of harm when [the destination is] an urban environment such as New York City," and that an above-Guidelines sentence was justified on that basis as well. *Id.* at 109a-110a.

At the same time, the district court concluded that petitioner's advanced age, "over seventy" years old at the time of sentencing, made him less likely to reoffend and less in need of deterrence. The court accordingly treated petitioner's age as a mitigating factor that partially offset the factors justifying a longer sentence. Pet. App. 116a.

Ultimately, the district court sentenced petitioner to 24 months of imprisonment, six months above the top of his advisory Guidelines range. Pet. App. 8a.

3. A panel of the court of appeals vacated petitioner's sentence. 505 F.3d at 220-225. The panel's opinion, which was handed down before this Court decided *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007), or *Gall* v. *United States*, 128 S. Ct. 586 (2007), concluded that the district court had erred in imposing a sentence based upon "its own public policy determination." 505 F.3d at 223.

The court of appeals reheard the case en banc and directed the parties to brief the impact of *Kimbrough* and *Gall*.

4. On rehearing, the en banc court affirmed petitioner's sentence, with four judges dissenting in part. See Pet. App. 2a, 33a.

a. The court of appeals unanimously agreed on the principles of law that govern appellate review of sentencing following this Court's decisions in *Kimbrough* and *Gall*. See Pet. App. 2a. The court explained that appellate review of a sentence for substantive reasonableness is deferential, but "still sufficient to identify those sentences that cannot be located within the range of permissible decisions." *Id.* at 18a. The court drew two principal lessons from this Court's recent decision in *Kimbrough*: first, "a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines," and second, a decision to do so "'may attract greatest respect when the sentencing judge finds a particular case outside the "heartland" to which the [Sentencing] Commission intends individual Guidelines to apply.'" *Id.* at 19a-20a (quoting *Kimbrough*, 128 S. Ct. at 574-575). The court acknowledged that "closer review may be in order" when a sentencing judge disagrees with the Guidelines in a "mine-run case" rather than an unusual one, *id.* at 20a (quoting *Kimbrough*, 128 S. Ct. at 575), but the court noted that "the scope and nature of 'closer review'" would "have to be fleshed out as issues present themselves." *Id.* at 20a-21a.

b. The court divided 10-4 on the application of these principles to petitioner's case. The majority concluded that the district court had not exceeded the bounds of

substantive reasonableness by imposing a sentence six months above the Guidelines range.[1]

The court expressly declined to rely on the ground that illegal gun trafficking warrants more severe punishment in a densely populated urban area. The court concluded that it need not reach that issue, noting only that the court was "divided" among those judges who believed that ground fell within the district court's "wide discretion," those who believed that "the district court erred," and those who were "unsure whether reference to such broad, nonspecific geographical and demographic factors [was] appropriate in the context of this case." Pet. App. 28a-29a.

The court of appeals determined instead that "the district court's second ground, that of deterrence, provides an independently sufficient justification for its variation from the Guidelines." Pet. App. 29a.[2] Specifically, the court of appeals found "considerable support" for the district court's view that in a jurisdiction such as New York City that has strict local gun laws, the profits from illegal gun trafficking are higher, and "the penalty needs to be correspondingly higher to achieve the same amount of deterrence." *Id.* at 29a-30a. Petitioner knew that the guns he sold were destined for New York City, and thus the district court did not abuse its discretion in "consider[ing] New York market conditions in order to accomplish the goal of general deterrence." *Id.* at 31a.

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[1] The court also found no procedural error in the sentence: the district court had correctly calculated petitioner's Guidelines range, Pet. App. 25a, and had followed the "sound practice" of informing the parties in advance that it was considering a non-Guidelines sentence, *id.* at 26a.

[2] The court found it "clear * * * from the record that the district court would have imposed the same sentence had it relied solely on the * * * heightened need for deterrence in this case." Pet. App. 32a-33a.

After noting that the district judge provided an "unusually detailed explanation of his reasoning," the court of appeals concluded that the district court's "deterrence-based rationale easily suffice[d] to justify" the variant sentence that petitioner received. *Id.* at 32a. Although that rationale was a locally focused one, the court of appeals agreed with the district court that "a finding 'that the crime will have a greater or lesser impact given the locality of its commission'" may be a permissible consideration in sentencing. *Id.* at 27a (quoting Pet. App. 111a-112a). (The court also agreed with the district court's caveat that "subjective considerations such as 'local mores'" would not be appropriate factors. *Ibid.* (quoting Pet. App. 111a).)

c. Judge Katzmann concurred, joined by three other judges. Pet. App. 33a-34a. He "note[d] * * * that an appellate court need not, in the end, find a district court's reasoning compelling in order to affirm." *Id.* at 34a.

d. Judge Raggi also concurred, joined by three other judges. Pet. App. 34a-61a. She would also have affirmed the sentence based on the district court's reasoning about the greater risk of harm caused by illegal gun trafficking in a densely populated urban area like New York City.

e. Judge Straub concurred in the court's general framework but dissented from the judgment, in an opinion joined in full or in part by three other judges. Pet. App. 62a-77a. He thought that the district court had not provided adequate support for its view that New York City's population density makes gun-smuggling crimes there more serious. *Id.* at 68a-72a. He also disagreed with the decision to affirm the sentence on the deterrence ground. *Id.* at 73a-76a. Although he agreed, "as

a general matter, that a district judge may rely on the need for greater deterrence based on a finding that firearms trafficking into New York City is more profitable than on average nationwide," *id.* at 73a, he thought that the record evidence in this case did not sufficiently establish that higher profitability, *id.* at 73a-75a.

f. Judge Sotomayor also concurred in part and dissented in part, joined in full or in part by three other judges. Pet. App. 78a-96a.[3] She urged that "[c]loser review" was warranted "in this mine-run case," on the grounds that the Sentencing Commission had made a deliberate "decision not to differentiate firearms trafficking sentences based on the firearms' destinations" and that the district court's assessment of local conditions "was not grounded in the district court's 'discrete institutional strengths.'" *Id.* at 80-82a (quoting *Kimbrough*, 128 S. Ct. at 574).

Judge Sotomayor concluded that upon "closer review," "the district court's analysis and data [we]re insufficient" to justify its variance from the Guidelines. Pet. App. 86a. On the deterrence ground, Judge Sotomayor raised methodological questions about the district court's analysis of the black market for guns, and she criticized the majority for "attempting to bolster the sentencing judge's argument by relying upon articles and economic theories never referenced by the district court." *Id.* at 93a; see *id.* at 91a-93a. Judge Sotomayor also contended that "[e]ven assuming that the majority's general deterrence rationale were correct, [petitioner's]

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[3] Judge Pooler also dissented; she joined the other two dissents but noted that she took no position on the district court's population-density rationale, on which the majority did not rely. Pet. App. 78a.

case is a particularly poor application," because petitioner lived in Florida. *Id.* at 93a.[4]

ARGUMENT

1. Petitioner contends (Pet. 11-14) that there is a disagreement among the courts of appeals as to the permissible scope of reasonableness review when a district court varies from the advisory Guidelines range "in a mine-run case." Pet. 12 (quoting *Kimbrough*, 128 S. Ct. at 575). This Court's decision in *Kimbrough* left open the question whether "closer review may be in order" when "the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Kimbrough*, 128 S. Ct. at 575 (quoting *Rita* v. *United States*, 551 U.S. 338, 351 (2007)). At present there is no conflict in the courts of appeals on that question and no reason for this Court to review it in this case.

a. The sole decision that petitioner identifies as supporting his preferred form of more searching review, *United States* v. *Funk*, 534 F.3d 522 (6th Cir. 2008), has since been vacated,[5] and the issue remains open in that circuit, see *United States* v. *Vandewege*, No. 07-2250,

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[4] Judge Sotomayor also disagreed with the conclusion that the sentence could be justified based on the deterrence rationale alone, when the district court had also relied on the population-density rationale, Pet. App. 94a-95a, which Judge Sotomayor also found unsupported, see *id.* at 86a-90a.

[5] On December 18, 2008, the Sixth Circuit granted rehearing en banc and vacated the panel opinion in *Funk*. On March 27, 2009, the Sixth Circuit granted the government's unopposed motion to dismiss the appeal, but the court clarified that "[t]he opinion of the panel [illegible] remains vacated." *United States* v. *Funk*, No. 05-3708, 2009 WL 792216, at *1.

2009 WL 928497, at *2-*3 (6th Cir. Apr. 8, 2009) (Gibbons, J., concurring in the judgment). No court of appeals has yet concluded that a district court's variance "in a mine-run case" warrants "closer review," much less defined the parameters of that closer review. Indeed, several of the courts that petitioner identifies as taking sides on the subject have not in fact done so. See, *e.g.*, *United States* v. *Friedman*, 554 F.3d 1301, 1311 n.13 (10th Cir. 2009) ("Given our conclusion that the sentence imposed by the district court is not based on a simple disagreement with the policies underlying [the Guidelines], * * * this court need not delve into a difficult antecedent question: how this court should review district court sentences based simply on a policy disagreement with the Guidelines."); *United States* v. *Williams*, 517 F.3d 801, 810-811 (5th Cir. 2008) (referring only briefly to "closer review"); *United States* v. *Carty*, 520 F.3d 984, 988-990, 993 n.8 (9th Cir.) (en banc) (same, in a case rejecting defendants' challenges to sentences within or below the Guidelines), cert. denied, 128 S. Ct. 2491 (2008).

Accordingly, at present there is no occasion for this Court to address *Kimbrough*'s reference to "closer review."

b. Even if there were a mature circuit conflict warranting this Court's resolution, this case would not implicate it. The court of appeals did not apply or reject a "closer review" standard, precisely because it did not deem this to be a mine-run case in which the district court imposed a sentence that squarely "reflected a categorical policy disagreement with the Guidelines." Pet. App. 26a. Rather, the majority concluded that the district court had "reached an *individualized* judgment" based on "the specific context of [petitioner's] case,"

including petitioner's advanced age. *Id.* at 32a (emphasis added). (Petitioner contends (Pet. 9) that this "concededly is a mine-run case"; that unsupported contention is incorrect.) Indeed, Judge Raggi devoted a section of her concurrence to why "closer review" need not apply in this case, precisely because the majority opinion did not see the need to address it. See Pet. App. 42a-47a.

c. The court of appeals applied the correct standard of review under this Court's decisions. In *Gall*, this Court held that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." 128 S. Ct. at 591. In reviewing a non-Guidelines sentence, an appellate court "must give due deference to the district court's decision that the [18 U.S.C.] § 3553(a) factors, on a whole, justify the extent of the variance," and it may "consider the extent of the deviation" from the Guidelines range. *Id.* at 597.

The decision below correctly applied those principles. The district court here imposed a sentence slightly (six months) above the Guidelines range, and it did so based on case-specific facts that it thought petitioner's advisory Guidelines range did not adequately take into account. The court of appeals concluded that the variance from the Guidelines was within the broad range of discretion confided to the sentencing court. No further review of that deferential and fact-bound decision is warranted.

2. Petitioner further contends (Pet. 14-20) that the court of appeals erred in affirming a sentence that was based in part on the district court's consideration of a local, community-based factor. The court of appeals'

deferential review of the district court's decision was correct and does not conflict with any decision of another court of appeals.

a. The en banc court did not consider the more purely local of the district court's two alternative rationales, *i.e.*, that gun trafficking is a more serious crime in New York City than in a less densely populated environment. Accordingly, petitioner's arguments concerning the district court's application of that factor, see, *e.g.*, Pet. 9, 17, are not properly presented.

b. Petitioner relies principally on court of appeals cases that predate not only *Gall* and *Kimbrough*, but also this Court's holding in *United States* v. *Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines are to be treated as advisory rather than mandatory. He ultimately acknowledges, however, that "the First and Second Circuits are the only courts that have recently considered this issue while applying the *current* decisions of this Court." Pet. 18 (emphasis added). And there is no conflict between the decision below and the law of the First Circuit.

In *United States* v. *Politano*, 522 F.3d 69 (1st Cir.), cert. denied, 129 S. Ct. 133 (2008), the defendant pleaded guilty to one count of illegal firearms dealing and faced an advisory Guidelines range of 12-18 months of imprisonment. *Id.* at 71. After considering the factors in Section 3553(a), the district court imposed a variance sentence of 24 months of imprisonment, based in part on considerations specific to Massachusetts. *Id.* at 72-73. The First Circuit affirmed the defendant's sentence as substantively reasonable and concluded that, after *Booker*, "it is now apparent that the district court has the discretion to take into account all of the circumstances under which [the defendant] committed the offense, in-

cluding the particular community in which the offense arose." *Id.* at 74. (The court of appeals receded from its contrary pre-*Booker* precedent. *Id.* at 73-74.) Because the district court's sentencing explanation was "grounded in case specific considerations," the First Circuit "accord[ed] a respectful deference to" the court's "fact-intensive sentencing decisions." *Id.* at 74 (internal quotation marks and citation omitted). In reaching that determination, the First Circuit, like the court of appeals in this case, relied specifically upon the need for the sentence "to afford adequate deterrence" within the meaning of 18 U.S.C. 3553(a)(2)(B). *Ibid.*

There is no conflict between *Politano* and the decision below. Indeed, *Politano* illustrates that the deterrence consideration that the district court cited and the court of appeals sustained in this case was less parochially focused. Whereas the district court in *Politano* referred generally to conditions in the District of Massachusetts, the district court in this case focused on the market effects of strict gun-control laws and the need for countervailing deterrence in punishment. Those considerations are a function of the market into which an illegal gun sale is made, not the general standards or problems of a single local community.

c. In the absence of such a conflict, there is no occasion for this Court to examine the district court's reliance on one somewhat location-specific concern (deterrence) in this case. Petitioner's appeals to "uniformity in sentencing," Pet. 18; see Pet. 16, 17, 19, are substantially undermined by this Court's decisions reaffirming that district courts retain substantial discretion to disagree with the Sentencing Guidelines, even "categorically * * * based on a policy disagreement" with par-

ticular Guidelines. *Spears* v. *United States*, 129 S. Ct. 840, 844 (2009) (per curiam) (clarifying *Kimbrough*).

Petitioner's remaining contentions amount to a dispute over the soundness of the particular evidence relied on by the district court in this case. Petitioner asserts (Pet. 15) that the district court relied on "[d]ated statistical analysis" and "controversial theories," and that the court's reliance made the resulting sentence substantively unreasonable. The court of appeals properly sustained the district court's assessment of the evidence as reasonable, and that wholly fact-bound decision does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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